

## The Obligation to ‘Indemnify and Hold Harmless’ under Austrian Law

### The Legal Nature, Scope and Enforcement of Indemnity Clauses<sup>1</sup>

Florian Scholz-Berger\*

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<sup>1</sup> The findings presented in this article draw on a more detailed analysis of the topic in my doctoral thesis which I submitted to the University of Vienna in 2017. A revised extensive version was published in the series ‘*Juristische Schriftenreihe*’ in 2019 (Florian Scholz-Berger, *Schad- und Klagloshaltung – Freistellungsvereinbarungen und ihre Durchsetzung* [Wien: Verlag Österreich, 2019]).

\* Dr. Florian Scholz-Berger is a post-doctoral researcher at the department of civil procedure, University of Vienna; [florian.scholz@univie.ac.at](mailto:florian.scholz@univie.ac.at).



## I. Introduction

When drafting contracts, parties – or their legal advisers who negotiate and draft the contracts for them – very often have to deal with situations of the following type: party A (the ‘indemnitee’) faces the risk to be confronted with certain kinds of third party claims (arising e.g. from damages suffered by the third party, outstanding debts, unpaid taxes etc.); party B (the ‘indemnitor’) agrees to assume (at least to some extent) the risks associated with these (potential) liabilities. There may be various reasons for such an agreement; for example, the specific risk might arise from potential breaches of contract or poor performance by A, or A has more knowledge/better control over the source of the risk, or the source of the risk serves primarily A’s economic interests. Finally, the assumption of risk may also be substitute for parts of a purchase price or it is the compensation for B assuming certain other risks by way of the respective contract. Some examples might help to illustrate this.<sup>2</sup>

Example 1:<sup>3</sup> A, a manufacturer of caravans, reassigns the contract for a particular part that is used in several of A’s caravan models. Several patents for similar components have been registered (inter alia by the company that previously supplied A with this specific part). Therefore, A has a clause included in the contract with the new supplier B, according to which B will indemnify and hold harmless A from all claims related to the infringement of patents.

Example 2:<sup>4</sup> A and B agree that A will formally take on the position of a managing director of an Austrian private limited liability company (Gesellschaft mit beschränkter Haftung, ‘GmbH’) in order to make his trade license available to the company. According to the agreement, A is supposed to act as a mere front man for B, who is the majority shareholder of the company and will act as its de-facto-managing-director. As part of the agreement B also promises A that A ‘should not

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<sup>2</sup> Cf. Scholz-Berger, ‘Schad- und Klagloshaltung’, pp. 1-2.

<sup>3</sup> This example follows the facts as stated in the decision of the German Bundesgerichtshof (‘German BGH’, the German court of last resort in civil and criminal cases) German BGH, 15.2.2010, VIII ZR 86/09; all decisions of the German BGH from the year 2000 onwards can be accessed via <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en>; most of the older decisions can be accessed via legal databases such as <https://beck-online.beck.de> or <https://www.juris.de/jportal/index.jsp> (subject to charges).

<sup>4</sup> This example follows the facts as stated in the decision by the Austrian Oberster Gerichtshof (‘Austrian OGH’, the Austrian Supreme Court of last resort in civil and criminal cases) Austrian OGH, 16.5.2006, 1 Ob 55/06d; for a similar example, where the indemnitee made its trade license available to the indemnitor by ways of a business partnership, see Austrian OGH, 14.2.1985, 8 Ob 511/85; all decisions of the Austrian OGH can be accessed via <http://ris.bka.gv.at/Jus/> with their case number.

incur any disadvantage from his position as managing director’ and that, therefore, B will indemnify and hold harmless A from any claims raised by third parties.

Example 3:<sup>5</sup> Company B operates a mobile network. A grants B the right to operate a transmission antenna on the roof of her house. In the contract concluded between the parties, B undertakes the obligation to indemnify A against all claims arising from the construction and operation of the transmission system and to bear all legal costs connected to such claims.

Example 4: A owns all shares of a GmbH that runs a construction business. A sells all the shares to B. In the purchase contract, A explicitly assumes the obligation to indemnify and hold harmless B from all liabilities of the company that do not appear in the accounting records on the transfer date. B in return agrees to indemnify and hold harmless A from certain liabilities which A had assumed as collateral for debts of the company.

As already mentioned and as demonstrated by the examples, such clauses can occur in a wide variety of (economical and factual) contexts;<sup>6</sup> their exact phrasing may also differ from case to case.<sup>7</sup> However, they all share a common feature, namely the purpose to shift the economic burden associated with certain liabilities or with a risk of liability from the indemnitee to the indemnitor. In Austrian contracts the phrase ‘schad- und klaglos halten’ (which best translates to ‘indemnify and hold harmless’) is most frequently used in this context,<sup>8</sup> while there are also other common terms such as ‘freistellen’, which can be seen as the terminological equivalent to the Austrian ‘schad- und klaglos halten’ in German legal practice.<sup>9</sup> Of course, all these terms – especially the English terms ‘to indemnify’ and/or ‘to hold harmless’, but also ‘schad- und klaglos halten’ as well as ‘freistellen’ in German – are also used in other contexts

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<sup>5</sup> This example follows the facts as stated in the decision by the Austrian OGH, 5.9.2000, 5 Ob 217/00y.

<sup>6</sup> For an overview see Scholz-Berger, ‘Schad- und Klagloshaltung’, pp. 13-20.

<sup>7</sup> This has already been pointed out e.g. by Karl Wolff, *Die Belastungsübernahme unter besonderer Berücksichtigung des österreichischen Rechts* (Wien: Manz, 1915) p. 41; this author goes too far, however, when concluding that phrases such as ‘schad- und klaglos halten’ give no indication of the actual legal effect of the respective clause.

<sup>8</sup> See for example Austrian OGH, 21.8.2013, 3 Ob 162/13i; 28.4.2016, 1 Ob 246/15f; Franz Mittendorfer and Sebastian Hütter, ‘Wesentliche Vertragsbestimmungen und Formulierungsbeispiele’, in Franz Mittendorfer (ed.), *Der Unternehmenskauf in der Praxis*, 2nd edn. (Wien: Verlag Österreich, 2019) 154-210, p. 197; Wilfried Thöni, ‘Section 1404 ABGB’, in Attila Fenyves, Ferdinand Kerschner and Andreas Vonkilch (eds.), *Großkommentar zum ABGB - Klang Kommentar §§ 1375-1410*, 3rd edn. (Wien: Verlag Österreich, 2011), para. 9 with further references.

<sup>9</sup> Cf. Austrian OGH, 28.4.2016, 1 Ob 246/15f.

and for other kinds of agreements.<sup>10</sup> For the purpose of this paper, I use these terms only for such agreements where the promise of the indemnitor given to the indemnitee relates to third party claims.

In spite of their great frequency and their practical significance, many aspects of the legal framework and the legal consequences of such agreements have not been clarified yet in Austrian case law and Austrian legal literature. This observation, however, is not only limited to Austrian law.<sup>11</sup> It has also been pointed out in Germany that, although contractual indemnification agreements are very common in international commercial contracts, parties are very often not sufficiently aware of their legal nature and legal effect.<sup>12</sup> Nevertheless, 'Freistellungs'-clauses have been discussed much more intensively in German case law and legal literature than in Austria.<sup>13</sup> In particular, there has been a discussion on the problem of possibly

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<sup>10</sup> For an overview of the use of the English term 'indemnity' from a common law perspective cf. Nuncio D'Angelo, 'The indemnity: It's all in the drafting' (2007) 35 *Australian Business Law Review* 93-109; Wayne Courtney, 'The nature of contractual indemnities' (2011) 41(11) *Sydney Law School Research Paper* 1-17 (available at <http://ssrn.com/abstract=1904095>); for the German terminology cf. Mark Hilgard, 'Der Freistellungsanspruch beim Unternehmenskauf' (2016) 21 *Betriebs-Berater* 1218-37, pp. 1218-9; Olaf Muthorst, 'Der Anspruch auf Befreiung von der Eventualverbindlichkeit' (2009) 209 *Archiv für die civilistische Praxis* 212-41, p. 213; for Austrian law see Scholz-Berger, 'Schad- und Klagloshaltung', pp. 5-10.

<sup>11</sup> And it is also not limited to German speaking jurisdictions only; see for example Rafal Zakrzewski, 'The Nature of a Claim on an Indemnity' (2006) 22 *Journal of Contract Law* 54-71, p. 54 ('Thousands of indemnity undertakings are given each day. Yet despite this, their legal nature and effect are surprisingly nebulous.');

<sup>12</sup> Patrick Ostendorf, 'Vertragliche Freistellungsansprüche für den Fall möglicher Vertragsverletzungen des Freistellungsschuldners im deutsch-englischen Rechtsvergleich' (2013) 68(13) *JuristenZeitung* 654-62, p. 654; similar Claudia Mayer, 'Zur Leistungs- und Abwehrkomponente des Anspruchs auf Befreiung von einer Verbindlichkeit' (2015) 2 *Zeitschrift für die gesamte Privatrechtswissenschaft* 226-49, p. 227; this was already pointed out by Hans Helmut Bischof, 'Der Freistellungsanspruch' (1984) 12 *ZIP - Zeitschrift für Wirtschaftsrecht* 1444-53, p. 1444 who sensed a 'great an unjustified carelessness' in dealing with this kind of contractual clauses.

<sup>13</sup> See for example Ostendorf, 'Vertragliche Freistellungsansprüche', p. 654; specifically from the point of view of M&A practice recently Hilgard, 'Freistellungsanspruch beim Unternehmenskauf', p. 1218 as well as Philipp Schütt, 'Streitigkeiten über Freistellungsansprüche in Unternehmenskaufverträgen' (2016) 14 *Neue Juristische Wochenschrift* 980-5; selective treatises on individual problem areas can be found for example in Kai Haakon Liekefett, 'Die Verjährung von Freistellungsansprüchen in M&A-Vertragswerken' (2005) 58(44) *Der Betrieb* 2398-400; Sandra Link, 'Die Verjährung von Freistellungsansprüchen - Auswirkungen auf die M&A-Praxis' (2012) 14 *Betriebs-Berater* 856-60; for the mutual claim for indemnification ('Befreiung'), laid down in section 10 para. 6 of the German VOB/B (the 'General Conditions of Contract Relating to the Execution of Construction Work', Part B of the 'German Construction Contract Procedures') see e.g. Claus Von Rintelen, 'Section 10 VOB/B', in Klaus Dieter Kapellmann and Burkhard Messerschmidt (eds.), *Vergabe- und Vertragsordnung für Bauleistungen - VOB-Kommentar*, 5th edn. (München: C. H. Beck, 2015) paras. 55-62; there is also a number of (partly older) treatises, which do not deal exclusively with questions of contractual indemnification agreements, but treat claims for indemnification ('Befreiungsansprüche') in a broader context; see e.g. Walter Gerhardt, *Der Befreiungsanspruch*:

unjustified (i.e. disputed) third party claims in recent years.<sup>14</sup> Therefore, the debate in the context of German law might pose a valuable contribution to a legal analysis of indemnity clauses under Austrian law at least to some extent.

The article intends to give an overview on the topic of indemnity clauses in Austrian law and attempts to analyse certain key aspects relating to such agreements. First, the legal classification of indemnity agreements under Austrian law and of the claims arising from such agreements are examined (II. and III.). Subsequently, this paper explores a question of particular practical relevance: the scope of indemnity clauses in the event of a claim being made by a third party. In this context, the conditions under which the indemnitor can also be held liable for the occurrence of possibly unjustified ('disputed') claims are clarified (IV.A.). Consequently, it is necessary to analyse the indemnitor's possibilities to fulfil their obligation vis-à-vis the indemnitee in such situations (IV.B.). Finally, the paper concludes with a discussion of the conditions under which the indemnitee can claim the payment of money from the indemnitor (VI.).

## II. Legal Classification

Austrian (statutory) law does not define the term indemnify and hold harmless ('schad- und klaglos halten'). As a consequence, there is no exclusive and explicit legal basis that determines the scope and/or the legal consequences of an indemnity clause under Austrian law.

However, there is no need to conclude that such clauses are completely alien to Austrian law. Contractual freedom is an underlying principle of Austrian private law. Therefore, parties may conclude any type of contract as long as it complies with mandatory rules and public policy;<sup>15</sup> they can enter into contracts that modify or combine existing types of contracts and are even able to create new types of contracts

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*zugleich ein Beitrag zum arbeitsrechtlichen Freistellungsanspruch* (Göttingen: Schwartz, 1966); Gerald Görmer, *Die Durchsetzung von Befreiungsansprüchen im zivilprozessualen Erkenntnis- und Vollstreckungsverfahren* (Frankfurt am Main: Peter Lang, 1992); Bischof, 'Freistellungsanspruch', p. 1444; Georg Bischoff, 'Der Befreiungsanspruch - materielle und prozessuale Probleme' (2007) 120 *Zeitschrift für Zivilprozess* 237-51.

<sup>14</sup> See for example Muthorst, 'Anspruch auf Befreiung', p. 212; Bernd Rohlfing, 'Wirksamkeit und Umfang von Freistellungsverpflichtungen' (2012) *Monatsschrift für Deutsches Recht* 257-60; Carl-Stephan Schweer and Valentin Todorow, 'Freistellungsansprüche bei streitiger Hauptforderung' (2013) 29 *Neue Juristische Wochenschrift* 2072-7; Mayer, 'Leistungs- und Abwehrkomponente', p. 226.

<sup>15</sup> Cf. section 879 of the Austrian civil code ('Austrian ABGB'). Section 878 Austrian ABGB further holds that '[s]omething that is outright impossible cannot be subject of a valid contract'; translation according to Peter Eschig and Erika Pircher-Eschig, *Das österreichische ABGB - The Austrian Civil Code* (Wien: Lexis Nexis, 2013) p. 211.

that statutory law does not explicitly provide for.<sup>16</sup> Typically, indemnity agreements are not concluded as a separate/distinct contract 'for itself'. Instead, indemnity clauses are mostly embedded in contracts like purchase contracts, service contracts or lease agreements etc. and form part of the broader context of the specific contract.<sup>17</sup>

In most cases<sup>18</sup> the Austrian OGH classifies 'Schad- und Klagloshaltungs'-clauses as 'Erfüllungsübernahme' according to section 1404 of the Austrian civil code<sup>19</sup> ('Austrian ABGB'). Said provision stipulates: '[w]hoever promises a debtor to procure the performance to his creditor (assumption of an obligation) is liable to the debtor that the creditor will not raise a claim against him. This does not create any direct rights for the creditor'.<sup>20</sup>

Admittedly, the wording of section 1404 Austrian ABGB only refers to agreements in which a person promises a debtor to procure 'the performance' (in most cases this is the payment of an amount of money) to her creditor. This, however, cannot be assumed to be the case with many typical indemnification agreements because the primary purpose of such clauses is to secure the indemnitee against claims by (potential) creditors who are often not even known at the stage of conclusion of the agreement. Hence, the wording of the indemnification agreement will often not mention the securing of the payment for the creditor (i.e. the third party). Historical, teleological and systematic interpretation, nevertheless, speak for a broad interpretation of section 1404 Austrian ABGB. Indeed, as is explicitly stated in the provision ('shall be liable to the debtor for the fact that the creditor does not avail himself of it'), the primary objective is to secure the indemnitee against possible losses arising from the third party claim.<sup>21</sup> This was also emphasised in the explanatory

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<sup>16</sup> See Stefan Perner, Martin Spitzer and Georg E. Kodek, *Bürgerliches Recht*, 6th edn. (Wien: Manz, 2016) pp. 232-4.

<sup>17</sup> Cf. the examples *supra* I.

<sup>18</sup> See e.g. Austrian OGH, 19.3.1974, 4 Ob 511/74; 26.4.1988, 4 Ob 530/88; 4.11.1999, 2 Ob 305/98m; 16.5.2006, 1 Ob 55/06d; 26.5.2010, 3 Ob 38/10z; in some cases, however, the Austrian OGH does not mention this provision but exclusively considers different legal bases: see e.g. 17.4.1985, 8 Ob 506/84; 15.4.1998, 3 Ob 2317/96y; 30.3.2000, 2 Ob 68/00i.

<sup>19</sup> Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie, Justizgesetzsammlung 1811/946, as amended by Austrian Federal OJ I 2019/105; all Austrian federal statutes can be accessed via <https://www.ris.bka.gv.at/Bund/> with their title, amendments can be found by their OJ number.

<sup>20</sup> Translation according to Eschig and Pircher-Eschig, 'The Austrian Civil Code', p. 336.

<sup>21</sup> Meinhard Lukas, 'Section 1404 ABGB', in Andreas Kletečka and Martin Schauer (eds.), *ABGB-ON - Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, edn. 1.01 (Online commentary, as of 15.9.2015, accessible via [www.rdb.at](http://www.rdb.at)) para. 3; Thöni, 'Section 1404 ABGB', para. 4; Austrian OGH, 26.4.1988, 4 Ob 530/88.

remarks on section 1404 Austrian ABGB.<sup>22</sup> Thus, I agree with the Austrian OGH that section 1404 Austrian ABGB is actually relevant for indemnification agreements in principle. However, the classification of indemnity clauses as ‘Erfüllungsübernahme’ has rather limited legal consequences; in fact, it (only) effects that the indemnitee can claim from the indemnitor, that the latter prevents a third party from (successfully) raising a claim against her (see III. below) and that the third party creditor does not gain any rights from the agreement between the indemnitor and the indemnitee.

At the same time, an indemnity clause will often also contain elements of other types of contracts,<sup>23</sup> such as a guarantee (‘Garantieabrede’).<sup>24</sup> For example, this may affect the limitation period for a claim based on the indemnification agreement.<sup>25</sup> In other cases – namely if the claim is contingent on a culpable breach of contract by the indemnitor – the claim arising from the indemnification agreement can be qualified as a modified claim for damages.<sup>26</sup> Overall, the precise legal consequences must always be determined by way of interpretation of the specific clause at hand.

### III. Legal Nature of the Claim arising from an Indemnification Agreement

As already stated above, a characteristic feature of an indemnity clause is that – once confronted with a third party claim that falls within the scope of the indemnity – the indemnitee may claim from the indemnitor that he prevents the third party from raising a (successful) claim against her.<sup>27</sup> The indemnitee thus not only has a claim for compensation *after* she has been forced to make payment to her creditor (the third party). She already has a legally enforceable claim (albeit for indemnification and not for payment) *before* payment to the creditor (the third party) has been made.<sup>28</sup> Such

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<sup>22</sup> Bericht der Kommission für Justitzgegenstände des Herrenhauses, 78 Beil HH 21. Sess 292.

<sup>23</sup> For further details see Scholz-Berger, ‘Schad- und Klagloshaltung’, pp. 48-50.

<sup>24</sup> Cf. section 880a Austrian ABGB; Rudolf Welser and Brigitta Zöchling-Jud, *Grundriss des Bürgerlichen Rechts*, 14th edn., 2nd. vol. (Wien: Manz, 2015), pp. 175-9.

<sup>25</sup> The prevailing view today is that the short limitation period according to section 1489 Austrian ABGB (three years upon the time the damaged party gains knowledge of the damage and the damaging party) applies to guarantee agreements; see e.g. Austrian OGH, 13.1.2009, 5 Ob 215/08s; Silvia Dullinger, ‘Section 880a ABGB’, in Peter Rummel and Meinhard Lukas (eds.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch – §§ 859-916*, 4th edn. (Wien: Manz, 2014), para. 25.

<sup>26</sup> Cf. Austrian OGH, 26.5.1999, 3 Ob 48/99a.

<sup>27</sup> See for example Austrian OGH, 30.1.1996, 1 Ob 605/95; 16.5.2006, 1 Ob 55/06d; 28.4.2016, 1 Ob 246/15f.

<sup>28</sup> Austrian OGH, 30.1.1996, 1 Ob 605/95; Gunter Ertl, ‘Section 1404 ABGB’, in Peter Rummel (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd edn. (Wien: Manz, 2002), para. 3; Martin Trenker, ‘(Außen-)Haftung des Treugeberkommanditisten (Teil I)’ (2017) *Der Gesellschafter* 32-41, p. 34.



claims can not only arise from contractual indemnity clauses. Austrian law knows various legal grounds from which indemnification claims can originate;<sup>29</sup> e.g. as a consequence of tortious behaviour<sup>30</sup> or in case a withdrawing partner of a partnership ('Offene Gesellschaft', 'Kommanditgesellschaft' or 'Gesellschaft Bürgerlichen Rechts' under Austrian law) has to be indemnified from company liabilities (section 137 para. 3 of the Austrian Commercial Code<sup>31</sup> ['Austrian UGB']; section 1203 para. 3 Austrian ABGB).

All claims for indemnification – regardless of the legal grounds they originate from – are characterised by the fact that the party who is to be indemnified is entitled to be held harmless from the respective third party claim by the indemnitor as just described above.<sup>32</sup> The indemnitor may fulfil this obligation in any manner, as long as it results in the final release of the indemnitee from the liability. This can be done – but does not *necessarily* have to be done – by performing the obligation that the indemnitee owes to the third party vis-à-vis said third party. In most cases, this will be the payment of a sum of money.

Since the indemnitor is thus not necessarily obliged to make a payment to the third party, the indemnitee cannot successfully sue the indemnitor for payment to the third party.<sup>33</sup> Rather, the indemnitee has to request in her prayer for relief that the court may order the defendant (i.e. the indemnitor) to 'indemnify' the claimant.<sup>34</sup> For the

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<sup>29</sup> See Georg E. Kodek, 'Der schadenersatzrechtliche Freistellungsanspruch – das unbekannte Wesen' (2015) *Zivilrecht aktuell* 204-7, pp. 204-5; Scholz-Berger, 'Schad- und Klagloshaltung', pp. 61-3; the situation in German law is quite similar; see e.g. Claudia Bittner, 'Section 257 BGB', in Julius von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – §§ 255-304*, revised edn. (Berlin: Sellier – de Gruyter, 2014), para. 22; Gerhardt, 'Befreiungsanspruch', p. 2; Mayer, 'Leistungs- und Abwehrkomponente', pp. 227-9; Muthorst, 'Anspruch auf Befreiung', p. 213.

<sup>30</sup> See Austrian OGH, 21.3.2018, 1 Ob 121/17a; Bernd A. Oberhofer, 'Die entstandene Ersatzverpflichtung als Schadensbild' (1995) *Österreichische Juristen-Zeitung* 180-6.

<sup>31</sup> Bundesgesetz über besondere zivilrechtliche Vorschriften für Unternehmen (Unternehmensgesetzbuch – UGB), Austrian Federal OJ I 2005/120 as amended by Austrian Federal OJ I 2019/63.

<sup>32</sup> Cf. Gerhardt, 'Befreiungsanspruch', pp. 2-3; Kodek, 'Freistellungsanspruch', pp. 204-5.

<sup>33</sup> The Austrian OGH, however, takes the opposite view and allows an action for payment to the third party; see e.g. Austrian OGH, 10.7.1991, 3 Ob 504/91; 18.9.1991, 1 Ob 1573/91; 30.1.1996, 1 Ob 605/95; see also e.g. Wolfgang Faber, 'Section 1404 ABGB', in Michael Schwimann and Georg E. Kodek (eds.), *ABGB-Praxiskommentar – §§ 1293-1503*, 4th edn. (Wien: Lexis Nexis, 2016), para. 5; Thöni, 'Section 1404 ABGB', para. 19.

<sup>34</sup> In German the correct terms would be 'befreien' or 'freistellen'; 'schad- und klagloshalten' is also a sufficiently clear wording in such a case; see Scholz-Berger, 'Schad- und Klagloshaltung', pp. 79-88; this is also the prevailing opinion under German law; see e.g. German BGH, 20.11.1995, II ZR 209/94; 12.9.2001, VIII ZR 67/00; Bischoff, 'Befreiungsanspruch', p. 240; Bittner, 'Section 257 BGB', para. 13; Gerhardt, 'Befreiungsanspruch', p. 13.



indemnitee this type of action has the advantage that lower requirements apply to the specification of the liability for which the indemnitor has to indemnify her than it would be the case in an action for payment.<sup>35</sup> An affirmative judgment on an indemnification claim is to be enforced as a substitutable act ('vertretbare Handlung') under section 353 of the Austrian Enforcement of Civil Judgments Act<sup>36</sup> ('Austrian EO').<sup>37</sup> The (former) claimant can thus be authorised by the court to carry out the action owed by the (former) defendant according to the judgment at the expense of the latter (substitute performance, 'Ersatzvornahme').<sup>38</sup> In case of a judgment, ordering the defendant to indemnify the claimant, the substitute performance will usually consist in performing the obligation that the indemnitee owes to the third party.

#### IV. Contractual Indemnification and Disputed Third Party Claims

##### A. Scope of the Agreement

For the purpose of discussion, in sections II. and III. of this paper, I have assumed that the indemnitee has a certain liability of a certain amount towards a certain third party. In many cases, however, it will be unclear for the time being (and therefore often an issue of dispute between the indemnitor and the indemnitee, but even more between those two and the third party) whether the claim asserted by the third party is justified at all.<sup>39</sup>

For the purpose of illustration, I will further elaborate example 1 from above:<sup>40</sup>

A has started to market the caravans with the part provided by the new supplier B. Now, company C, a former supplier of A, claims that the design of the part infringes its patent right and now asserts claims against manufacturer A for putting the infringing product on the market. A now turns to B, who manufactures the part in

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<sup>35</sup> Kodek, 'Freistellungsanspruch', pp. 205-6.

<sup>36</sup> Gesetz vom 27. Mai 1896, über das Exekutions- und Sicherungsverfahren (Exekutionsordnung - EO), Imperial Law Gazette ('Reichsgesetzblatt') 1896/79 as amended by Austrian Federal OJ I 2019/105.

<sup>37</sup> See e.g. Trenker, '(Außen-)Haftung', p. 34; for further details see Scholz-Berger, 'Schad- und Klagloshaltung', pp. 92-9.

<sup>38</sup> Cf. e.g. Kodek, 'Freistellungsanspruch', pp. 206-7.

<sup>39</sup> For German law this problem has been examined e.g. by Mayer, 'Leistungs- und Abwehrkomponente'; Muthorst, 'Anspruch auf Befreiung'; Rohlfing, 'Freistellungsverpflichtungen'; Schweer and Todorow, 'Freistellungsansprüche'; the German BGH has explicitly addressed those topics in several decisions, see e.g. 24.6.1970, VIII ZR 268/67; 19.1.1983, IVa ZR 116/81; 19.4.2002, V ZR 3/01; 15.12.2010, VIII ZR 86/09.

<sup>40</sup> See section I.

question and has promised to indemnify and hold harmless A. B does not dispute his obligation to indemnify and hold harmless A, but points out that in his opinion, no infringement of patent rights took place, and therefore the – thus unjustified – claim of C is not his problem. In the meantime, C explicitly threatens to sue A.

In such situations, an important question might arise: whether the obligations of B under the indemnity clause are contingent to the actual occurrence of an infringement of industrial property rights (which A would have to prove in a law suit against B), or if it suffices that A is approached by a third party who *claims* that their rights have been infringed. In the second case, B would also be responsible for defending A against unsubstantiated claims by third parties.

Obviously, there is no one-fits-for-all-answer to this question, as it has to be answered by way of interpretation of the specific indemnity clause used in a specific contract.<sup>41</sup> However, some general guidelines can be worked out for the interpretation of indemnity clauses in such situations.

The first starting point for this is, of course, the wording of the clause. The Austrian-German term 'schad- und klaglos halten', specifically the word 'klaglos halten' suggests at least to some degree that the indemnitee is relieved of all risks and burdens connected with claims raised by third parties.<sup>42</sup> However, the wording alone will often not permit a conclusive assessment – especially since parties usually use 'standard' formulations in the drafting of contracts without much consideration. Thus, the mere fact that certain words are used in a contract will not always lead to a conclusive assessment of the parties' intention. Additionally, indemnity clauses sometimes use quite ambiguous language.<sup>43</sup>

Therefore, it is necessary to also employ other methods of interpretation.<sup>44</sup> In particular, a determination of the circumstances of the agreement will help to clarify

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<sup>41</sup> See – for German law – Muthorst, 'Anspruch auf Befreiung', p. 219; Ostendorf, 'Vertragliche Freistellungsansprüche', p. 658; Schütt, 'Freistellungsansprüche in Unternehmenskaufverträgen', pp. 983-4; von Rintelen, 'Section 10 VOB/B', para. 58; Alexander Zahn, 'Freistellungsklage und Klage auf Feststellung der Freistellungsverpflichtung' (2007) *Zeitschrift für deutsches und internationales Bau- und Vergaberecht* 627-33, p. 631.

<sup>42</sup> Cf. Austrian OGH, 14.2.1985, 8 Ob 511/85; 21.8.2013, 3 Ob 162/13i; see also Scholz-Berger, 'Schad- und Klagloshaltung', pp. 109-10; examples for quite clear and unambiguous clauses can be found in Austrian OGH, 26.3.1896, 2862/86 GIU 15756 (indemnification from all claims 'that might be raised' against the indemnitee) and Austrian OGH, 16.5.2006, 1 Ob 55/06d (the indemnitee 'shall not suffer any disadvantage' from his position as a director).

<sup>43</sup> Cf. the examples given by Scholz-Berger, 'Schad- und Klagloshaltung', pp. 109-10.

<sup>44</sup> For an overview of the methods of contract interpretation under Austrian law see Andreas Vonkilch, 'Section 914 ABGB', in Attila Fenyves, Ferdinand Kerschner and Andreas Vonkilch (eds.), *Großkommentar zum ABGB - Klang Kommentar §§ 897-916*, 3rd edn. (Wien: Verlag Österreich, 2011), paras. 138-222.

the interests of the parties and the purpose they pursued. This will very often show that the indemnity clause aims at relieving the indemnitee as far as possible from the burden of potential disputes with the third party. At the same time the indemnitor often has an interest in controlling this dispute himself in order to ward off or minimise any liability. It can therefore be said that the following factors will typically lead to an indemnity clause that also covers disputed third party claims:<sup>45</sup>

- a) if the indemnity clause amounts to the general assumption of a liability risk by the indemnitor (as opposed to a narrowly defined indemnity only for individual, specifically designated liabilities);
- b) in the case of a particular 'proximity' of the indemnitor to the grounds for the third party claim that might for example result in an information advantage over the indemnitee or might enable the indemnitor to control the risk much better than the indemnitee could.

For example 1 mentioned above, this leads to the conclusion that the clause at hand extends to disputed third party claims. B will also be responsible for defending the claim and/or will have to bear the negative consequences of not doing so (see section B. below)<sup>46</sup> because the risk of provoking infringement claims lies in B's sphere. B is – and this is the more important point – also in a much better position to defend against such claims since he knows all details about design and production of the part he provides. Moreover, the obvious intention of the clause was that the risk of liability in relation to the pre-existing industrial-property rights was to be carried by B.

## **B. Content and Enforcement of the Claim**

### **1. Preconditions**

Once the interpretation of the indemnity clause has led to the conclusion that the obligation of the indemnitor extends to all claims raised by a third party (i.e. also to disputed third party claims), the problem remains that a contract only concluded between the indemnitee and the indemnitor cannot legally prevent the third party from suing the indemnitee.<sup>47</sup> In proceedings brought by a third party against the indemnitee, the indemnitor cannot just 'step in' and replace the indemnitee as the

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<sup>45</sup> Cf. Scholz-Berger, 'Schad- und Klagloshaltung', pp. 111-8.

<sup>46</sup> The German BGH came to the same conclusion in its decision of 15.2.2010, VIII ZR 86/09.

<sup>47</sup> Cf. Andreas von Tuhr, *Actio de in rem verso: Zugleich ein Beitrag zur Lehre von der Geschäftsführung* (Freiburg im Breisgau, 1895; reprinted Aalen: Scientia, 1970) pp. 95-6; Austrian OGH, 14.2.1985, 8 Ob 511/85.

defendant.<sup>48</sup> Neither could the indemnitor establish the non-existence of the disputed claim by raising a declaratory action against the third party, because a judgment rendered in such proceedings would not have *res judicata* effects between the indemnitee and the third party.<sup>49</sup> In any court dispute with the third party, the indemnitee therefore has to participate (at least *pro forma*) as claimant or defendant. Even the negotiation of an out of court settlement between the indemnitor and the third party would require at least a certain degree of cooperation by the indemnitee.

Obviously, parties would be well advised to explicitly address and clarify all those issues when drafting an indemnity clause; above all, to lay down clear rules for defending against third-party claims (bearing of costs, selection of lawyers etc.).<sup>50</sup> Nevertheless, all these questions are very often not explicitly, or at least not sufficiently, addressed in contracts. Therefore, the following section of the paper aims at suggesting some general guidelines for operating under typical clauses that merely stipulate an obligation to indemnify without regulating the specifics.

## 2. Consequences for the Content of the Claim and its Enforcement

Within the limits defined by the procedural restriction laid out above (section IV.B.1.), the indemnitor is obliged to relieve the indemnitee as far as possible of the encumbrances and risks caused by being confronted with a claim by the third party. This obligation applies from the moment a claim is first raised by a third party. At this point, the risk covered by the indemnification agreement materialises.<sup>51</sup> In such a situation, the claim of the indemnitee is not directed at being indemnified from a (proven or undisputed) third party obligation itself. Rather, the indemnitor is obliged to relieve the indemnitee of the risk that the claim asserted by the third party might be successfully enforced against her.<sup>52</sup> The indemnitor could theoretically effect this by the same means that he could otherwise employ to indemnify the indemnitee from an undisputed or proven liability (see III. above). In particular he could, of course, satisfy the (alleged) obligation the third party claims to be owed by the indemnitee.<sup>53</sup> The risk at hand would also cease to exist, however, if it were established in a legally binding way (e.g. a court decision with *res judicata* effect binding the third party) that the third party does not actually have a claim against the indemnitee.

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<sup>48</sup> See Scholz-Berger, 'Schad- und Klagloshaltung', pp. 121-125; see also (for German law) Schweer and Todorow, 'Freistellungsansprüche', p. 2076.

<sup>49</sup> Cf. (for German law) Muthorst, 'Anspruch auf Befreiung', p. 233.

<sup>50</sup> Cf. Hilgard, 'Freistellungsanspruch beim Unternehmenskauf', p. 1237.

<sup>51</sup> Cf. Mayer, 'Leistungs- und Abwehrkomponente', p. 241.

<sup>52</sup> Cf. Muthorst, 'Anspruch auf Befreiung', p. 234.

<sup>53</sup> Muthorst, 'Anspruch auf Befreiung', p. 232.

Therefore, the indemnitor cannot be forced to satisfy the claim of the third party, since there is still a chance to defend this claim.<sup>54</sup> Accordingly, the indemnitor has to be given the opportunity to make his own efforts to defend the indemnitee against the asserted claim – but only under a certain condition: while defending against the third party, he has to provisionally relieve the indemnitee from the risk of the third party being ultimately successful in enforcing its alleged claim and from the economic burden associated with defending against the claim.<sup>55</sup>

Usually, the debtor will thus have to assist the indemnitee in extrajudicial negotiations with the third party and will have to provide a lawyer for judicial defence, participate in proceedings as intervening party ('Nebenintervenient' according to section 17 of the Austrian Code of Civil Procedure<sup>56</sup> ['Austrian ZPO']) and bear any other costs.<sup>57</sup> If the individual clause does not include an agreement to the contrary, he also has to provide the indemnitee with a security for the event that the third party is successful and acquires an enforceable title against the indemnitee.<sup>58</sup> This security protects the indemnitee against being abandoned by the indemnitor after a lost lawsuit or in case the indemnitor becomes insolvent.<sup>59</sup>

All this puts the indemnitee at least temporarily in the position to which she is entitled under the indemnification agreement.<sup>60</sup> Her claim, therefore, becomes temporarily unenforceable and the indemnitor may raise a temporary objection against enforcement of the claim of the indemnitee ('dilatorische Einrede'). If the indemnitor is successful in defending the indemnitee against the claim (either because his efforts result in a binding decision on the non-existence of the claim or by entering a settlement with the third party), he has ultimately fulfilled his obligation under the indemnification agreement.

If, on the other hand, the indemnitor does not relieve the indemnitee of the economic burden and the risks described above, the claim for indemnification remains enforceable and the indemnitee can successfully sue the indemnitor for indemnification (see section III. above). In such a case he could also enforce the

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<sup>54</sup> See e.g. Ostendorf, 'Vertragliche Freistellungsansprüche', p. 658.

<sup>55</sup> Scholz-Berger, 'Schad- und Klagloshaltung', pp. 148-52.

<sup>56</sup> Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung - ZPO), Imperial Law Gazette ('Reichsgesetzblatt') 1895/113 as amended by Austrian Federal OJ I 2018/109.

<sup>57</sup> See Scholz-Berger, 'Schad- und Klagloshaltung', p. 144 with further references.

<sup>58</sup> Schweer and Todorow, 'Freistellungsansprüche', p. 2076; Scholz-Berger, 'Schad- und Klagloshaltung', pp. 145-7.

<sup>59</sup> Cf. Schweer and Todorow, 'Freistellungsansprüche', p. 2076.

<sup>60</sup> Cf. Ostendorf, 'Vertragliche Freistellungsansprüche', p. 658.

judgment granting the injunction for indemnification pursuant to section 353 Austrian EO (see also section III. above) irrespective of the fact that the claim asserted by the third party is still disputed and has not been established. As a result, the indemnitor who does not stand up to his obligations under the indemnification agreement, can be forced to fulfil a disputed third-party claim, even though the third party claim has not been proven at all.<sup>61</sup>

## V. Payment Claim

As long as the indemnitee is exposed to a claim by a third party, she generally ‘only’ has a claim for indemnification and no claim for payment. It may be a different matter if she withdraws from the contract due to a default of the debtor (i.e. the indemnitor) (‘Schuldnerverzug’, section 918 Austrian ABGB).<sup>62</sup> In this case, the indemnitee can claim damages for non-performance of the contract; i.e. she could claim damages for not being indemnified for the liability vis-à-vis the third party (of course, the indemnitor would have to prove existence and amount of the liability).<sup>63</sup>

Apart from this special case, the indemnitee may only have a claim for payment under the indemnity clause if she has already made payment to the third party.<sup>64</sup>

By promising to indemnify the other party in a ‘Schad- und Klagloshaltung’ agreement, the indemnitor typically assumes the entire economic burden that results from the third party claim. Subject to an agreement to the contrary in the individual case, he is thus obliged to fully release the indemnitee from said burden. Therefore, the indemnitee has a claim for compensation under the agreement if she herself has had to make payment to the third party.<sup>65</sup>

The detailed preconditions of the claim for payment depend on the content and scope of the respective indemnity clause:<sup>66</sup>

If the interpretation of the respective indemnity clause leads to the conclusion that the original claim for indemnification did not extend to disputed third party claims, the same naturally also applies to the claim for compensation in money. When

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<sup>61</sup> Scholz-Berger, ‘Schad- und Klagloshaltung’, p. 172.

<sup>62</sup> Cf. Scholz-Berger, ‘Schad- und Klagloshaltung’, pp. 138-9.

<sup>63</sup> See for German law Mayer, ‘Leistungs- und Abwehrkomponente’, pp. 234, 238.

<sup>64</sup> Austrian OGH, 30.1.1996, 1 Ob 605/95; 16.5.2006, 1 Ob 55/06d; 31.8.2016, 2 Ob 202/15t with further references.

<sup>65</sup> See Scholz-Berger, ‘Schad- und Klagloshaltung’, pp. 185-91 with further references.

<sup>66</sup> Cf. section IV.B. above.



asserting her claim for payment, the indemnitee must therefore prove that she has satisfied a third party claim that was actually justified.<sup>67</sup>

If, however, the indemnity clause also extends to disputed third party claims,<sup>68</sup> the interpretation of the clause will usually lead to the further conclusion that it depends on the previous conduct of the indemnitee and the indemnitor whether the indemnitee must prove that the claim of the third party satisfied by her was justified.<sup>69</sup> If the indemnitee has granted the indemnitor (sufficient) opportunity to relieve the indemnitee from the risk and burden associated with the third party claim as set out above (see section IV.B.2) and if the latter has not done so, the indemnitee may claim compensation, even without providing appropriate evidence. This is because the indemnitor has assumed the obligation to relieve the indemnitee of the burden of dealing with the third party and has failed to do so.

If, on the other hand, the indemnitee has not given the indemnitor (sufficient) opportunity to relieve the indemnitee of the risk and burden associated with the third party claim, her contractual claim for damages is restricted to third party liabilities that the indemnitee has proven to be justified. As a result, she can only claim payment under the same preconditions as in those cases in which the indemnity clause did not extend to disputed third party claims from the outset.

## VI. Summary

There is no explicit provision on indemnity clauses in Austrian law. In general, however, such clauses fall within the scope of section 1404 of the Austrian ABGB. However, this is only the first step in qualifying indemnity clauses. The precise legal consequences must always be determined by way of interpretation of the specific clause at hand. This will often lead to the conclusion that the indemnity clause also contains elements of other types of contracts, e.g. a guarantee ('Garantieabrede').

A characteristic feature of an indemnity clause is that the indemnitee may claim from the indemnitor that he prevents the third party from raising a (successful) claim

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<sup>67</sup> Of course, if the indemnitee has given third party notice ('Streitverkündigung') to the indemnitor during the proceedings between herself and the third party, she can now rely on the effects of the judgment rendered in those proceedings ('Interventionswirkung'); cf. Austrian OGH, 8.4.1997, 1 Ob 2123/96; Martin Trenker, 'Interventionswirkung bei Streitverkündigung und Nebenintervention' (2015) *Österreichische Juristen-Zeitung* 103-11.

<sup>68</sup> See section IV.A. above.

<sup>69</sup> The German BGH and the prevailing opinion in German doctrine reach a very similar conclusion, albeit on different legal grounds; see e.g. German BGH, 19.1.1983, IVa ZR 116/81; 19.4.2002, V ZR 3/01; Hilgard, 'Freistellungsanspruch beim Unternehmenskauf', pp. 1229-30; Mayer, 'Leistungs- und Abwehrkomponente', pp. 236-8.

against her. The indemnitee thus not only has a claim for compensation after she has been forced to make payment to the third party. She already has a legally enforceable claim before payment to the third party has been made.

In many situations it will be unclear (and, thus, disputed between the indemnitor and the indemnitee, but even more between those two and the third party) whether a claim which is raised by a third party against the indemnitee is justified. In such cases, the question arises whether the obligations of the indemnitor under the indemnity clause are contingent to being confronted with a justified third party claim or if it is sufficient that a third party approaches the indemnitee. Only in the second case, the indemnitor would also be responsible for defending the indemnitee against unsubstantiated claims by third parties. Obviously, this question has to be answered by ways of interpretation of the specific indemnity clause used in a specific contract. However, there are some general guidelines for the interpretation of indemnity clauses in such situations which have been laid out in section IV.A.

Even if the obligation of the indemnitor under a specific clause extends to disputed third party claims, the question remains, how the indemnitor can fulfil said obligations in a situation where a third party raises a possibly unjustified claim against the indemnitee.

In such a situation, the claim of the indemnitee against the indemnitor is not directed at being indemnified from a proven or undisputed third party obligation itself. Rather, the indemnitor is obliged to relieve the indemnitee from the risk that the claim asserted by the third party might be successfully enforced against her, as has been laid out in detail in section IV.B.2. If the indemnitor fails to do so, however, the indemnitee can successfully sue him for indemnification and enforce a judgment against him without proving that the claim asserted by the third party is justified.

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